

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

**SBC COMMUNICATIONS INC.,)
SBC DELAWARE INC.,)
AMERITECH CORPORATION,)
ILLINOIS BELL TELEPHONE COMPANY)
d/b/a AMERITECH ILLINOIS and)
AMERITECH ILLINOIS METRO, INC.)**

98-0555

**Joint Application for approval of the)
reorganization of Illinois Bell Telephone)
Company d/b/a Ameritech Illinois,)
and the reorganization of Ameritech)
Illinois Metro, Inc. in accordance)
with Section 7-204 of The Public Utilities)
Act and for all other appropriate relief.)**

DISSENTING OPINION

**November 18, 1999, dissenting opinion of Commissioner Terry S. Harvill to
the Order entered by the Commission on September 23, 1999.**

On May 10, 1998, Ameritech and SBC announced a "pooling-of-interests" merger guaranteed to be one of the largest corporate unions in the history of the United States, with the combined company controlling nearly one-third of all phone lines in the country. With jurisdiction over the transaction, the Illinois Commerce Commission has been propelled to the forefront of the debate between advocates for consumers and competitive markets, and an industry in which great pressures exists to consolidate. In innumerable ways this decision will directly influence the telecommunications environment not just in northern and central Illinois but across the nation and around the world.

Recent consolidation suggests the existence of a strong current of change in the telecommunications industry while the picture of true competition in Illinois' local exchange market is far more placid. Ripples around the edge of this market represent niche competition, primarily for high-speed business access, while competition for residential, and small and medium-sized business customers remains relatively stagnant. *We should not be satisfied with the torpid state of competition in any of these markets.*

Over the years, this Commission has garnered and maintained a reputation for leadership in telecommunications regulation. Foreword looking policy had placed Illinois on a trend toward more competitive markets for small and large volume customers. However, I am convinced that the Majority's decision to approve this merger has diverted Illinois from a pro-competitive path thus retarding the flow of benefits to retail consumers from a revolution in telecommunications offerings. The Majority's abidance to the company's fortress strategy will irreparably hinder the evolution to a more open, competitive market providing a variety of products choices and higher quality service in Illinois.

While I appreciate and understand my fellow Commissioners' interest in national and global markets, I believe that this perspective is better held by members of the Federal Communication Commission. I offer my analysis of this case within the framework of the Illinois Public Utilities Act, which proscribes the Commission from approving mergers that are likely to have a significant adverse effect on competition *in Illinois*.¹

The Department of Justice *Horizontal Merger Guidelines* provide an appropriate starting point for analyzing the effect this merger will have on competition. Also critical is consideration of the unique attributes of this market. The "structure-conduct-performance" paradigm represented by the *Guidelines* focuses on those elements of market structure and firm behavior that will ultimately have an impact on industry performance. It also allows the Commission to investigate the widest array of factors impacting competition. I concur with the Majority that this Commssion should "resist the invitation to apply any of these doctrines in a strict fashion" and that we should "maintain flexibility in interpreting and in applying the elements of the *Guidelines* and similar analytical frameworks."² The *Guidelines* have a solid basis in the economics of industrial organization, and they should be used to focus the Commission's analysis on those aspects of mergers that are important. They should not be employed mechanically.

Regrettably, the Majority's good intention is nullified by its contrived application of economic principles to the evidence in this case. The Majority fails to adapt the *Guidelines* to its analysis of the Illinois market and, in fact, relegates its analysis to a mechanistic review of the evidence in the context of the framework. The Majority's opinion is nothing more than an *ad hoc* review of the parties' positions and as such misinterprets the evidence and leads to a erroneous conclusion.

Therefore, I respectfully dissent from the Majority opinion and offer the following.

¹ 220 ILCS 5/7-204 et seq.

² Order at 97.

The Relevant Market

The first step in any merger analysis is to define the relevant markets. Identifying markets correctly is fundamental to any merger analysis because if they are not correctly identified, the Commission has no basis (or a faulty basis) on which to undertake its merger analysis.

Initially, the Majority correctly finds that the Commission has jurisdiction over three types of telecommunications services: interLATA interexchange, intraLATA interexchange and local exchange.³ However, after finding that the interLATA interexchange and intraLATA interexchange markets will not be impacted by this merger, the Majority identifies the “Illinois local exchange market” as the only “relevant” market to their analysis.⁴ The Majority has mistakenly identified the relevant markets that should bear on our consideration. Plainly, even within the Majority’s own definition of “market” there are at least three separate markets that should be identified from the evidence as standard anti-trust analysis recognizes both product market and geographic delineation.⁵ Perhaps more could be developed as a result of geographical delineation. Specifically, the record indicates that the relevant markets to our review are the Illinois local exchange market inside and outside the the Chicago MSA, and within those geographical variations, large volume customers are a distinct market from residential and smaller volume customers, as these product lines are not substitutes for each other. The Majority has improperly delineated these markets and therefore reached conclusions based on an inaccurate foundation of analysis.

Additionally, the order discusses the Majority’s concern that residential and small business customers would not be served by SBC if it were to enter as a competitor. Without a clear delineation of markets the Commission is reviewing, a host of questions are raised concerning the Majority’s merger review. For example, did the Majority review the large volume local exchange market? If not, did the Majority find that the large volume business markets are not markets over which the Commission has jurisdiction? If so, did the Majority find that SBC would enter the large business market, but not other markets? Did the Majority take into account that the same assets used in entering the large volume local exchange market can be leveraged to enter these other markets? The answers to these questions have a direct bearing on whether the SBC and Ameritech have met their burden of proof.

³ Order at 95. The Order also recognizes that the wireless market is of some import.

⁴ Id. At 96.

⁵ Staff Briefing on Re-Opening at 5. The relevant market is defined by services which are “reasonably interchangeable by consumers for the same purpose.”

Barriers to Entry

Evidence of increased barriers to entry resulting from this merger is clear and compelling. Raised by Staff, a number of significant barriers to entry will handicap or prohibit the growth of competition in Illinois.⁶ They include increased sunk costs⁷ such as those for marketing, an asymmetric balance of information favoring the incumbent, and uncertainty concerning state approval under Section 271 of the Federal Telecommunication Act of 1996. All of these have the effect of increasing the risk of entering the Illinois telecommunications market and therefore increasing the cost of doing business for competitive local exchange carriers (CLECs).⁸

The merger will have the effect of limiting the availability and quality of information concerning the prices of unbundled network elements, standards for the company's operations support systems (OSS), and resale prices which will create uncertainty and increase rivals sunk and capital costs. SBC is also likely to modify the terms and conditions of tariffs and common operating procedures, a common practice among acquiring companies. Unilateral change in OSS standards or procedures would likely have anti-competitive effects.⁹

I am dismayed that the Majority chooses to simply dismiss this evidence as "unclear," or "speculative."¹⁰ The Majority's finding that "these cost driven and technical matters are of import, but can be worked out suitably" baffles me for two reasons.¹¹ First, the Majority does not explain what "worked out suitably" means, how long it will take or what the costs would be. Second, it admits that these are "cost-driven" issues, but simply dismisses them.¹² The Majority cannot have it both ways. If these factors increase the cost of doing business for CLECs, then by the Majority's own definition they are barriers to entry. The Majority's *status quo* argument is not harmonious with the Act, nor is it consonant with good policy.

In evaluating the weight of the evidence, I am compelled to consider SBC's track record dealing with competitors, the courts, and regulators. The stinging evidence in this case that SBC is an ultra-aggressive and ruthless competitor leaves the company with an especially heavy burden in my mind. Were there less convincing evidence that SBC's reputation of obstruction, obfuscation, and bad faith was well-deserved, it would

⁶ ICC Staff Initial Brief at 14.

⁷ The notion of sunk costs is important because it denotes a level of commitment on the part of the firm that makes the "sunk" investment. These are costs that are expected to produce a stream of benefits over a long period of time but are completely unrecoverable. See generally Staff Ex. 4.00. Sunk costs represent a barrier to entry to the extent that they act like an "entrance fee." Since a firm that is currently in the market would not pay an entrance fee, sunk costs can represent one type of entry barrier.

⁸ ICC Staff Ex. 4.00 at 20.

⁹ Governmental and Consumer Intervenors Exhibit 2.0 at 68.

¹⁰ Order at 99.

¹¹ *Id.*

¹² *Id.*

be easier to give the company the benefit of the doubt.¹³ This is not to say that SBC was not given a fair opportunity to provide a fact-based defense of its position. In fact, SBC was provided two opportunities to do so. However, the company's argument was weakly supported with vague assertions and empty promises from corporate executives. I am deeply skeptical that SBC will perform its obligations as an incumbent or to this Commission in good faith and that "these cost driven and technical matters...can be worked out" as the Majority hopes.¹⁴ As such, a fair reading of the record indicates that the SBC did not meet its burden to prove that the merger would not have a significant adverse effect on competition in Illinois.

Potential Competition

The most important economic questions presented by this case are whether SBC was likely to have entered the relevant markets and the effect entry would have on those markets. Although I do not differ with the Majority's doctrinal choice to adopt the theory of actual potential competition for its analysis, I believe that the overwhelming weight of the evidence strongly suggests that SBC would have entered the Illinois market and would have had a significant impact on competition both through pressure on prices and the offering of new services at higher quality.

The doctrine is summed up succinctly by Justice Marshall:

When a firm enters the market by acquiring a strong company within the market, it merely assumes the position of that company without necessarily increasing competitive pressures. Had such a firm not entered by acquisition, it might at some point have entered *de novo*. An entry *de novo* *would* increase competitive pressures within the market, and an entry by acquisition eliminates the possibility that such an increase will take place in the future. Thus, even if a firm at the fringe of the market exerts no present procompetitive effect, its entry by acquisition may end for all time the promise of more effective competition at some future date. [W]here a powerful firm is engaging in a related line of commerce at the fringe of the relevant market, where it has a strong incentive to enter the market *de novo*, and where it has the financial capabilities to do so, we have not hesitated to ascribe to it the role of an actual potential entrant. In such cases, we have held that ... entry by acquisition [is prohibited] since such an entry eliminates the possibility of future actual competition which would occur if there were an entry *de novo*.¹⁵

¹³ See *SBC v. AT&T Communications of Southwest, Inc.*, No. A 97-CA-132 SS, at 31 W.D. Tex. , August 31, 1998; Staff Initial Brief at 128-129 discussing SBC's conduct with Covad Communications; GCI Exhibit 1.0 at 46; AARP Exhibit 1.0 at 29.

¹⁴ Order at 99.

¹⁵ *United States v. Falstaff Brewing Corp.*, 410 US 526, 561 (1973).

However, potential competition is of even more significance when the market in question is a monopoly. As the evidence indicates, Ameritech-Illinois is a *de facto* monopoly. Professors Areeda and Hovenkamp writing on mergers in highly concentrated markets warn:

Merger with a potential competitor acquires special significance when one of the firms is a monopolist . . . [W]hen one of the merging firms is a monopolist and the other is a potential entrant into the same market in which the monopolist has its power, anti-competitive concerns are much more realistic . . . As a general matter, a monopolist's acquisition of a 'likely' entrant into the market in which monopoly power is held is presumptively anti-competitive . . . [E]ven if [the potential entrant] seems clearly to be one of several firms which are "equally probable" potential entrants, it is important to preserve all those significant possibilities of eroding the monopoly, and to prevent possible reinforcement of the monopolist's position via the assets acquired (paragraphing omitted)¹⁶

The Commission must therefore review this merger with heightened sensitivity to unique nature of the current market structure. Simply applying blackletter antitrust doctrine to this case, as the Majority does, fails to properly consider important aspects of the local telecommunications environment and is fatal to the Majority's analysis.

Time-frame for Analysis

The Majority's two-year timeframe for analysis is not supported by a preponderance of the evidence, nor by its own arguments. First, I note that the Majority explicitly recognizes that "the attempt to capture large business customers requires extensive planning, advance marketing strategies, surveys, testing and the like."¹⁷ While the Majority's list does not exhaust the needed preparation and effort to enter the relevant markets, by the Majority's own admission, a two-year timeframe may be suspect. The Majority provides the following "reasons" for using the two-year timeframe:

The Commission agrees with the Joint Applicants position *to some degree* and gives as its reason the fast and continuing evolution of telecommunications industry. The record well shows that the industry is anything but stagnant. Further, the Commission notes, as an example, that in evaluating the three to five year standard retrospectively, it could not have, with any level of precision forecast the state of the market as it stands today if we had attempted to do so in either 1994 or 1996. (emphasis added)¹⁸

¹⁶ Philip E. Areeda and Herbert Hovenkamp, 3 Antitrust Law (rev. ed. 1996) at 136. Cited in BA/NYNEX.

¹⁷ Order at 103.

¹⁸ 98-0555 Final Order at 97.

The Majority's opinion does not explain why it agrees only to "some degree" yet fully adopts the Joint Applicant's argument. Its conclusion on this point appears to be based on sensational headlines from the Wall Street Journal or a trade publication rather than the record in this case, which definitively indicates that the local exchange market remains a *de facto* monopoly even after years of so-called telecommunications deregulation. Staff provided a rational definition of timeframe (a reasonable period of time for entry) that is related to market structure.¹⁹ According to this view, entry must be likely within the period of time a market is expected to remain concentrated such that the acquiring firm's pro-competitive entry will be needed.²⁰ The foundation of this timeframe is based on accepted anti-trust principles and has been identified by reviewing courts as an appropriate basis in reviewing the necessary period for entry.

Despite the sea change in some sectors of the telecommunications industry since passage of the Telecommunications Act of 1996—most notably in long-distance, data, internet, and wireless—structural change in the local exchange market in Illinois has been nearly imperceptible. In light of this idling progress, I am highly skeptical that even a three to five-year horizon is completely realistic. I am astonished that the Majority concludes (seemingly unconvinced itself) that competition in the relevant markets (that is, the local exchange market) is "anything but stagnant."²¹ Its contention that changes in the telecommunications market would have been impossible to predict three to five years ago belies the slow pace of change that has actually occurred at the local exchange level over the past five years and the virulent barriers to entry that will continue to exist beyond the consummation of this merger.

The Majority's decision on a two-year timeframe for analysis under the theory of actual potential competition is not supported by the weight of the evidence or sound economic policy. The only fact-based timeframe is the three to five-year timeframe proposed by the Staff of the ICC.

Actual Potential Competition Doctrine

The FCC has clearly articulated the five elements of the traditional Actual Potential Competition Doctrine.²² They are as follows: (1) the target market must be concentrated (HHI²³ above 1800); (2) the company entering by merger must have been

¹⁹ Staff Brief on Re-Opening at 67.

²⁰ *Id.* Citing *Mercantile Tx. Corp. v. Board of Governors*, 638 F.2d 1255 (5th Cir. 1981).

²¹ 98-0555 Final Order at 96.

²² BA/NYNEX, ¶ 138.

²³ The Herfindahl-Hirshman Index measures the level of market concentration. The index sums the square of the individual market participant's market shares. The HHI, under plausible conditions, directly measures a firm's ability to increase its profit as concentration increases. Persistent economic profit can be a sign of market power and in turn can indicate inefficiencies in the allocation of resources. The Guidelines view the HHI generally as one appropriate method of measuring concentration. The Guidelines provide for three categories of market concentration: Un-concentrated with HHI below 1000, Moderately concentrated with HHI between 1000-1800, and highly concentrated with HHI above 1800. A

reasonably likely to have entered the market except for the merger; (3) there must be proof that the company entering the market had feasible means of entry other than by acquisition of the target firm; (4) few other potential entrants are “equivalent” to the company proposing the merger; and (5) there must be proof that such alternative means offer a substantial likelihood of ultimately producing deconcentration of the target market or other significant pro competitive effects. The Order uses a similar delineation, although in a different order.

1. The target market must be concentrated.

The record indicates that the Herfindahl-Hirshman Index (HHI) is in excess of 9000 for the relevant markets.²⁴ While SBC and Ameritech contend that the measures used by Staff and others to calculate the HHI are deficient, they provided no alternative calculations.²⁵ Ameritech’s arguments against using access lines as an indicator rests largely on the assertion that these numbers do not include bypass customers.

While we must recognize the inexact nature of the HHI calculations found in the record, these calculations indicate the general degree of concentration in the relevant local exchange markets. Further, even if the calculations were altered to address SBC and Ameritech’s contentions, nowhere in the record do SBC and Ameritech argue that such altering would produce an HHI below 1800 for the relevant markets. As such, the Majority’s finding that the relevant Ameritech-Illinois markets are “highly concentrated” is appropriate.

2. The company entering by merger must have been reasonably likely to have entered the market except for the merger.

Finding that the first prong of the actual potential competition doctrine has been met, I turn to the second: whether SBC would have been reasonably likely to have entered the market but for the merger. I believe that the weight of the evidence in this case demonstrates that SBC studied, planned, and determined that it would enter the Illinois market. Unfortunately for consumers, SBC chose to enter the market by capturing Ameritech rather than competing with it.

In reaching this conclusion, I found evidence of SBC’s intent prior to its acquisition of Ameritech such as the sworn testimony of corporate executives, the existence of substantial physical and personnel assets in Illinois, the company’s experience as a local exchange carrier, and the economic attractiveness of Illinois markets highly probative. I note, however, that the statements of SBC corporate executives were less compelling.

perfect monopoly has an HHI of 10,000.

²⁴ Staff Exhibit 9.0 at 16, Staff Exhibit 4.0 at 10, GCI Exhibit 2.0 at 43.

²⁵ Joint Applicants Exhibit 4.1.

The evidence does not indicate that SBC “may have the incentive to eventually enter” the Illinois local exchange markets as the Majority found.²⁶ Quite the contrary, the evidence presented by Staff and others indicates that SBC would and in fact, must enter the Illinois market. In testimony to California regulators less than two years before the public announcement of this merger, SBC corporate executives indicated the company’s intention to enter the Chicago local exchange market.²⁷ SBC’s Senior Vice President for Corporate Development, James S. Kahan, stated as much in a filing before the California Public Utilities Commission. At the time, Mr. Kahan was confident that SBC’s strategic assets in Chicago made Illinois an attractive market for the company.

In addition, SBC’s economic witness, Dr. Richard Gilbert, echoed Mr. Kahan’s analysis in testimony before the FCC. Dr. Gilbert indicated that SBC considered expanding into new areas “only where it has some combination of the following existing assets: a network infrastructure, an existing customer base, and brand-name recognition. Thus, SBC is considering providing local exchange service in competition with Ameritech in the Chicago area, where SBC has a significant cellular presence...”²⁸

Furthermore, SBC admitted that its Cellular One name is well-known in Illinois, that Cellular One has a sophisticated billing system in Illinois, and that its Illinois marketing managers are “some of the best” in the country.²⁹ Both Dr. Gilbert’s testimony at the FCC and SBC’s admission to this Commission refute the Majority’s finding that “[T]he record contains little evidence that SBC has a strong brand name in Illinois or inspires an increased amount of confidence among consumers.”³⁰

As recently as 1997 SBC made overtures toward entry into Illinois markets on the local exchange level. In April of that year, SBMS Illinois Services, a subsidiary of SBC, filed an application to expand the geographic scope of its certificate to provide facilities-based local exchange service. In that filing, SBC indicated that:

While the constantly changing events have slowed us down, I believe it has allowed us to better refine our plans and has led to the decision to seek expanded certificate authority since we believe we can begin providing service in other geographic areas of the state outside of the Chicago metropolitan area.

²⁶ Order at 104.

²⁷ California Public Utilities Commission, 96-05-038, In the Matter of the Joint Application of Pacific Telesis Group and SBC Communications Inc. for SBC to Control Pacific Bell, Rebuttal Testimony of James S. Kahan, October 15, 1996, at 2.

²⁸ Before the FCC, Report of Richard J. Gilbert, “Response to Opponents’ Comments Concerning the Proposed Pacific Telesis-SBC Merger,” August 7, 1996 quoted by Sprint witness Woodbury (Direct) at 10.

²⁹ Although the Joint Applicants attempted to revise Dr. Gilbert’s testimony before the FCC in this case I find his pre-merger comments particularly credible and convincing. Oral Argument Transcript at 458. The legitimacy of Dr. Gilbert’s testimony to the FCC has been confirmed subsequent to the Commission’s approval of the merger by the announcement that GTE, which has purchased Ameritech’s wireless assets, will use wireless as a “toehold” to enter the SBC/Ameritech service area.

³⁰ Order at 103.

Hopefully, unless other intervening events slow us down, we will be able to begin providing service initially in Chicago and subsequently elsewhere within the next few months. At this point, it is our intention to initially resell service of other carriers and may subsequently deploy our own facilities-based on market conditions.³¹

SBC also stated in its 1997 Annual Report that one of its Cellular One Wireless strategies was to “[A]ttract new wireless customers by offering long-distance service...[and to]...promote local landline service to those customers who will also buy wireless and long-distance service.”³² Only after announcing the planned merger with Ameritech did SBC disavow this strategy.³³ SBC’s growth strategy appears to have changed with its decision to acquire Ameritech.³⁴ While this shift in tactic may be coincidental, substantial and forceful evidence suggests that SBC intended to enter the Illinois local exchange market as a competitor. In the context of its prior statements and evidence from the company suggesting the success of wireless beach-head experiments, testimony to the contrary is unpersuasive.³⁵ Although coming to light after the Commission’s final decision, recent news accounts that GTE will utilize Ameritech’s cellular operation and customer base as a toe-hold to market wireline service in the Chicago area confirms my strong belief that the Majority has been misled into finding that the strategy is not viable.³⁶

Interestingly, the contention that wireless could not be used successfully as a beach-head also conflicts with the consent decree that Ameritech and SBC entered into with the Department of Justice. The decree requires the divestment of Ameritech’s wireless properties in the St. Louis areas in order to provide a third party the opportunity to compete against the Joint Applicants in St. Louis by expanding from those cellular properties into wireline service.³⁷ The Majority, incongruously, finds that

³¹ ICC Docket No. 97-0118, Testimony of Dane Ershen on Behalf of SBMS Illinois Services, Inc. at 7.

³² SBC Growth Profile 97 at 35, quoted by Staff Exhibit 4.00 at 28.

³³ Joint Applicant Exhibit 1.1 at 70; Staff Brief on Re-Opening at 13.

³⁴ Staff Brief on Re-Opening at 13.

³⁵ SBC/Ameritech Exhibit 1.1 at 66-69, 79; Ex. 9.0 at 5; Ex. 1.2 at 8-12; Ex. 3.2 at 3; Also see Joint Applicants’ Reply Brief at 41; Cross Ex. 37 (Confidential); Kahan Surrebuttal. Joint Applicants’ Ex. 1.2 at 10.

³⁶ Jon Van and Darnel Little, *Ameritech Cellular Deal Could Connect GTE to the Local Phone Market*, Chicago Tribune, October 25, 1999, Business Section at 2. (“When you have customers who trust your service in wireless, it makes sense to go to them first with new services,” Annette Jacobs, the new President of Ameritech Cellular said.); Jon Van, *Takeover of GTE Wins ICC Approval: Chicago Could Gain More Competition*, Chicago Tribune, October 30, 1999, Business Section at 1. (“GTE already has taken ownership of Ameritech’s cellular phone system in Chicago, St. Louis and some markets in between. Even though it will keep the Ameritech Cellular name for a while, GTE regards the purchase as its beachhead for invading the Chicago local phone wireline market once its merger with Bell Atlantic closes. ‘[GTE] will offer fully bundled packages of phone services to our Chicago customers,’ spokesman James Hargrave said”); Dennis Conrad, *Illinois Regulators Back Proposed GTE-Bell Atlantic Merger*, Associated Press State and Local Wire, October 30, 1999, State and Regional Section. (“GTE recently acquired Ameritech’s cellular properties and plans to provide Chicago and 20 other cities with new choices for local, long distance, and other services.”)

³⁷ Proposed Final Judgement, *United States v. SBC Communications, Inc.*, 1:99CV00715 at 4 (DDC filed

the Joint Applicants “adequately countered the suggestion that cellular expansion is a feasible alternative means of entry.”³⁸

Further, SBC has made numerous and often conflicting statements concerning its intentions before regulatory bodies, a disappointing pattern that continued in this case. Some of these strategic pronouncements have come to pass while others clearly have not. It is necessary to view statements made by the Company concerning future competitive actions with some degree of skepticism especially when those statements have a clear self-serving purpose as in the instant docket. While SBC maintains that no business plans *currently* exist that indicate entry would have been likely to enter as a competitor, the lack of any specific entry plans initiated immediately prior to, or concurrent with, merger talks with Ameritech is not surprising. The economic conditions that exist in the telecommunications market along with the actions of SBC provide the strongest proof that SBC was not only likely to enter Illinois but was poised to do so with or without the merger.

The economic attractiveness of expanding into Illinois can be measured by considering evidence that SBC saw profit opportunities in this market and the extent to which Illinois would provide these opportunities to SBC, absent the merger. SBC has made it clear, through its acquisition of Ameritech, that Illinois is one of the states within which it would prefer to operate. If this were not so, SBC would divest Ameritech-Illinois assets to concentrate on Ameritech’s other states. SBC/Ameritech witness Gebhardt emphatically rejected the notion that Ameritech Illinois would voluntarily divest any portion of its operations. It is also counter intuitive that SBC would spin off the gem of Ameritech’s five state service region.³⁹

SBC clearly has strong profit incentives to enter the Illinois market. Chicago would represent SBC’s second largest “in-region” telecommunications market behind Los Angeles and is the third largest MSA nationwide. Furthermore, Ameritech is the dominant provider in the Illinois marketplace. As one of very few unique competitors (see discussion below), entry into the Chicago market would likely be quite profitable. However, determining the profitability of entry is a complicated process, which no party attempted to project in any tangible fashion. However, the record does supply the necessary information to draw a definitive conclusion that the Illinois market would be profitable, and SBC would be likely to enter.

First, all of the potential and actual competitors in this proceeding are vigorously opposed to this merger. They undeniably believe that Illinois is a profit center, and the merger will make it more difficult to compete here. Second, SBC is a confident and aggressive competitor that claims to have the knowledge and experience to provide the services that customers want.⁴⁰ Third, SBC’s National/Local strategy depends critically

March 23, 1999); Department of Justice Press Release of March 23, 1999 at 2.

³⁸ Order at 105.

³⁹ Joint Applicants’ Exhibit 3.1.

⁴⁰ Joint Applicants’ Exhibit 1.0 at 26. Testimony from James Kahan that SBC companies rank 2 and 3 in

on capitalizing on “anchor tenants,” the concept that SBC would follow its large multi-state and multi-national customers to any city in which they operate.⁴¹ The economics of the telecommunications industry dictate that SBC seek to provide services to their largest customers regardless of whether they are the local provider. If SBC is as adept a competitor as it claims (and I believe it to be) then it would have a *better chance* at obtaining the favor of these customers relative to a CLEC that did not have the same extensive expertise in providing local service. Entry would be *necessary* to target large corporations which are the industry’s most profitable consumers.⁴² Revenues from these organizations constitute approximately 18 percent of total revenues amounting to approximately \$1.26 billion.⁴³ Significantly, SBC’s profits from serving such customers bundled services would increase substantially when the profits from data or long distance services are added.⁴⁴ These businesses would likely be lost to competitors who provided one-stop shopping if it chose not to pursue such a national/local strategy. SBC, as a result, would have to enter Illinois as a defensive strategy to protect a significant segment of SBC’s current customer base.⁴⁵

Finally, through strategic investments in other companies SBC has positioned itself to undertake a national bundled services strategy in the absence of the merger by investing in an unrivaled broadband network.⁴⁶ Clearly, steps to implement such a strategy would *necessarily* bring it to Illinois as a competitor, a point that the Majority fails accord even the slightest modicum of weight. Furthermore, SBC has the incentive and resources to undertake such a strategy either with or without the proposed merger. Entry into Illinois would be necessary for it to target cellular customers, as wireless customers are typically high-value customers.⁴⁷ The company has a strong incentive to increase the revenues derived from its cellular base by expanding the types of services that SBC offers to its wireless customers, services that—according to the evidence—would include wireline service. SBC’s large number of cellular customers and facilities in Illinois would almost certainly require the company to expand in Illinois.⁴⁸ As the cellular market becomes saturated, competitive pressure would force SBC to provide its cellular customers with wireline services, an established method of competing for customers. As SBC has recognized, the success of a bundled strategy clearly provides an incentive for it to undertake a cellular expansion strategy as a defensive measure to secure SBC’s cellular customer base.⁴⁹ The record shows that

high quality service.

⁴¹ SBC/Ameritech Ex. 1.0 at 7.

⁴² Staff Reply Brief on Exceptions at 21, 24. Citing SBC’s announcement to shareholders that its goal is to provide one stop shopping to large corporate customers.

⁴³ Ameritech’s 1998 revenues were \$17.1 billion. ICC Staff Exhibit 4.02 attachment 5.

⁴⁴ Staff Brief on Re-Opening at 16.

⁴⁵ Staff Reply Brief on Exceptions at 21.

⁴⁶ Staff Brief on Re-Opening at 14-16 (citing Tr. at 1915-1916, 2052-53)). ICC Staff Ex. 4.02 at 11. Tr. at 2052-2053. ICC Staff Ex. 4.02 at 10 (citing SBC Investor Briefing: The Dynamics of Data, No. 204 at 4-5 (Nov. 10, 1998). Also see ICC Staff Ex. 4.02 at 11-12 (citing Williams Communications Press Release, Williams Communications Forms Unique Alliance with SBC, (Feb. 8, 1999). ICC Staff Ex. 4.02 at 12.

⁴⁷ SBC-Ameritech Ex. 1.0, att. 2. SBC 1997 Annual Report to Shareholders.

⁴⁸ Staff Initial Brief at 19-20.

⁴⁹ Staff Brief on Re-Opening at 12-13.

SBC had actual plans to pursue cellular expansion which it abandoned in favor of acquisition. Internal documents established a cellular entry plan. Those documents include financial plans, Marketing Research and Analysis Department surveys, and cellular business plans. They establish that cellular expansion would be profitable and very likely successful for the company. SBC only abandoned those plans when it choose to pursue acquisition instead of competitive entry.⁵⁰

The Majority's unsatisfying conclusion when faced with these compelling facts is to surrenderingly suggest "change breeds change."⁵¹ Such a response by the Majority serves to highlight inadequacy of its conclusions based on the record. Further, the Majority finds that SBC would not have entered the "small business or residential markets."⁵² Even if the cellular expansion route is discounted, SBC's own National/Local strategy indicates that entry would be more likely in the large business markets. After its initial business-oriented entry, SBC has indicated that it would expand into the retail residential and small business markets.⁵³ Nothing in the statute or the actual potential competitor doctrine requires an insurgent company to compete initially for all segments of the market. If the National/Local strategy is relevant, and SBC had the incentive to undertake such a strategy absent the merger, as the evidence indicates, the Majority appears to have disregarded the Company's own admissions.

Also unclear is the standard the Majority has employed to evaluate the evidence contained in the record. While the FCC and some courts discuss entry by potential competitors in terms of reasonable likelihood rather than probability, the Majority's application of reasonable probability to the facts in this case seems to suggest the existence of a very high burden of proof. Although conceding that Commissioners can differ on the weight of the evidence and that probability can be synonymous with likely, the Majority's choice (whether intentional or careless) to use the language it did, coupled with its conclusion, suggest to me that their standard is inappropriately higher than what traditional economic analysis demands and leaves me wondering what amount of evidence the Majority would find convincing.

⁵⁰ ICC Staff Ex. 4.02 attachment 1 (showing that SBC's last public announcement of cellular expansion occurred four days before SBC entered into merger talks with Ameritech).

⁵¹ Order at 104.

⁵² Id.

⁵³ SBC/Ameritech Ex 1.0 at 7

3. There must be proof that the company entering the market had feasible means of entry other than by acquisition of the target firm.

Several aspects of the third element of the actual potential competitor doctrine are intertwined with questions of likelihood of entry under the second prong. I have chosen not to reiterate these arguments to the extent that there is overlap in the analysis. Entry absent the merger could be facilitated by leveraging existing assets or via a toehold acquisition among other methods. I have already noted SBC's strategic investment in a national broadband network. These partnerships could also be used to establish a toehold in the Illinois market.

According to SBC witnesses, the company could raise the capital necessary to implement its National/Local strategy absent the merger.⁵⁴ SBC's financial ability to pursue its National/Local strategy without acquiring Ameritech leads inextricably to the conclusion that it does indeed possess reasonable alternative means of entry. GCI witnesses made the point concisely, testifying that "[although] the acquisition of Ameritech may constitute one means for pursuing a National-Local Strategy, it is by no means the only approach that SBC could utilize."⁵⁵

In addition, SBC has positioned itself to enter Illinois through a currently operating CLEC. SBC owns 19.9 percent, of OnePoint Communications, a CLEC with an annual growth rate approaching 100 percent and over 20,000 subscribers in five markets including Chicago, with an option to increase ownership by another 10 percent.⁵⁶ SBC's investment in OnePoint clearly indicates the strategic and profit potential of the Illinois market. SBC has argued that its ownership interests in Williams, Concentric, and OnePoint do not provide it with control. However, Dr. Harris, SBC's own economic witness, testified that ownership interests of approximately 10 percent are "significant" and create "strong alliance[s]" which are substantially greater alliances than mere "joint venture[s]" or "loose strategy alliance[s]."⁵⁷ Public relations material distributed by Williams' indicates a strong alliance of the type referenced by the Joint Applicant's own witness. Evidence exists that SBC has treated other companies within which it has made similar investments as strong alliances, providing those companies

⁵⁴ SBC/Ameritech Exhibit 1.1 at 14. "...either SBC or Ameritech could raise \$2.5 billion in capital without this merger." SBC/Ameritech witness Harris agrees that there are many different strategies for entering local exchange markets. "Competitors can enter new markets as niche players, full service providers, or anywhere in-between. By "re-integrating" components from several different suppliers and providers, each new entrant can pursue its own unique entry strategy, increasing its chances of success. Thus, even the smallest new entrant has the potential to compete with the broad service offerings of the largest competitors."

⁵⁵ GCI Ex. 1.0 at 19. This is true according to Selwyn "even if...the 35-million access line, \$46-billion in combined assets SBC/Pacific/SNET would lack the resources necessary to take on "competitors" who to date have collectively failed to capture more than slightly over one percent of SBC/Pacific's local exchange service market share."

⁵⁶ Tr. at 2015. ICC Staff Ex. 4.02 at 9 (citing SBC Response to Data Request R CLG-001, SBCAMIL 02667).)

⁵⁷ Tr. at 1281-1282.

with significant direction in the form of marketing, engineering, and management training.⁵⁸ In spite of this evidence the Majority finds:

The evidence, taken and weighed together fails to rise to the level necessary for the Commission to find, under the actual potential competitor doctrine, that alternative, feasible means of entry, into the broader local exchange market, other than through the proposed merger, are easily available to the Joint Applicants. Although many parties argued that SBC has alternative means to enter, evidence also exists which shows that SBC might only enter the large business market and choose to serve only large business customers and not serve the less profitable small business and residential segments of the local exchange market. No evidence supports the proposition that SBC would have entered the residential segment of the local exchange market within the requisite time period. Therefore, the Commission concludes that record evidence is insufficient to support the inference and the conclusion that entry by SBC either independently, or through a toehold is a reasonably probable means of entry with a two year period.⁵⁹

As noted above, even if one discounts the cellular expansion route, SBC's own National/Local strategy and investments indicate that it had a feasible means of entry other than by acquisition of Ameritech.⁶⁰ The Majority's fated and hollow conclusion is indicative of the indiscriminate nature of their analysis.

4. Few other potential entrants are "equivalent" to the company proposing the merger.

The fourth element of the actual potential competitor doctrine asks whether there are more than a few other equivalent potential entrants. The Department of Justice *Merger Guidelines* have attempted to quantify this element by suggesting that if three or more firms remain that are equivalent to the actual potential entrant then a merger is not likely to raise competitive concerns, and six or more would not raise competitive concerns. However, the *Guidelines* are generally applied to industries that are not regulated and involve firms with market shares far above those of CLECs in Illinois. Any review of equivalent competitors must take into account the nascent state of the competitive telecommunications marketplace in Illinois. A simple enumeration of actual potential competitors will not suffice. In order to assure that this merger will not adversely impact competition a proper analysis will attempt to assess the ability of competitors to produce the price-constraining competition that I believe the Act intends to introduce into Illinois.

⁵⁸ ICC Staff Ex. 4.02 at 13.

⁵⁹ Order at 106-107.

⁶⁰ Staff Ex. 4.00 at 40. The National-Local Strategy is not unique to SBC or Ameritech. CLECs like NEXTLINK, Teligent, MCI, and Winstar have proposed similar plans to place switches in the top MSAs and try to sell their services to Fortune 500 companies. SBC has substantially more resources than most of these rivals. SBC has economies of scale in procurement and research and development, key areas for competition in the market for large business customers. I see no reason why they can not enter that market now.

Staff identified 22 competitors in the Illinois market that actually provide local exchange service. Of these, only 13 are facilities-based providers, the remainder being resellers.⁶¹ For the purpose of determining if potential competitors are equivalent to Ameritech, it is appropriate to review only facilities-based competitors for several reasons. Most importantly, resellers, by definition, cannot respond to increased prices by increasing supply. Second, the actual percentage of the market captured by resellers is extremely limited.⁶² Third, the extent to which resellers become facility-based competitors is limited. Finally, resale is an artifact of the Telecommunications Act of 1996 and relies heavily on regulation and the cooperation of incumbent providers. Chief among those regulatory decisions is the appropriate discount for wholesale services. From an economic perspective, resellers should not be included when attempting to review the market for competitors and potential competitors that will have long-term effects on the market.⁶³ Resellers, by themselves, do not represent actual potential entrants into the facilities-based local exchange markets.

Evidence differed as to the number and quality of potential competitors in this case. SBC and Ameritech named MCI WorldCom, AT&T-TCI, Sprint and all other Regional Bell Operating Companies (RBOCs) as potential and actual competitors in addition to many unnamed “niche” players.⁶⁴ Staff, however, contends the only significant potential competitors are the remaining RBOCs, with Bell Atlantic being the only “first tier” potential competitor.⁶⁵

Comparing the potential entrants can be done by a review of the financial and operating statistics of the firms named above. Sprint Exhibit DES-6 provides a rough comparison of the above named firms. A combined SBC/Ameritech is a somewhat larger competitor rivaled only by AT&T. However, AT&T operates in all 50 states, while SBC and Ameritech would operate in only 13 states. Further financial results for several of the large competitors and SBC and Ameritech are reviewed in Table 1 (see appendix). Note that the RBOCs (and GTE) tend to have very similar financials rivaled only by AT&T. Of particular note are the extremely high return on equities for the RBOCs.⁶⁶ To put these numbers in context, it is be useful to compare the company’s return on equity (or profit) with other industries that have historically been dominated by one or a few firms. Table 2 (see appendix) provides a review of average profit rates for firms that were considered dominate in the years 1960-1970.⁶⁷ Notice the levels of return on equity and profit margins that have been, in the past, indicators of monopoly

⁶¹ Staff Exhibit 4.00 at 17.

⁶² Staff estimates that at the end of 1997 only 171,776 of IBT’s 6,850,665 lines were being resold. That amounts to about 2.5%. Staff Exhibit 4.00 at 17.

⁶³ Staff Ex. 9.0.

⁶⁴ SBC/Ameritech Exhibits 1.1 pp. 5-6 and 4.1 p. 11.

⁶⁵ Staff Exhibit 9.0 at 23.

⁶⁶ While this data is now stale, an update based on the same data source for the work-papers of Staff Exhibit 9.0 will show a similar pattern.

⁶⁷ These firms accounted for half or more of total sales and whose rivals were generally much smaller.

power. The RBOCs all have equity returns far exceeding, what just 30 years ago would have been considered “supra-normal” profits.⁶⁸

Bond ratings are another method of comparing companies. Bond ratings do two things. They indicate the credit worthiness of a company. That is, how much confidence the market has in its management and business plan. A higher bond rating lowers borrowing costs providing a competitive advantage to higher rated companies. They also indicate the perceived steadiness of cash flow. A higher rated company is perceived to have a steady flow of cash that can be directed to repay bonds. SBC has a rating of AA- and Ameritech has a rating of AA+. Only AT&T has a similar rating of AA- with MCI/WorldCom (BBB+) and Sprint (Baa) somewhat lower.⁶⁹

Further, confirmation of the very few potential competitors that currently exist can be found in the words of SBC’s economic witness who testified that only Bell Atlantic, with or without GTE could compete on a national basis.⁷⁰ While Dr. Harris leaves open the possibility that future mergers may provide RBOCs like Bell South with the ability to compete, currently, these companies alone are not the type of competitors that will give the old Ameritech Illinois or the new SBC a “run for its money.”

I am convinced that the evidence shows Bell Atlantic, with or without GTE, to be the only RBOC capable or even likely to compete with SBC for customers in Illinois. As for long distance carriers, AT&T appears to be the only one that has the financial resources to enter and expand in Illinois. However, AT&T’s likely strategy, cable-based telephony, has not been deployed on a MSA basis anywhere in the country. AT&T’s potential as a competitor in the local exchange market is uncertain and will at best develop to an economically significant level long into the future.⁷¹ MCI WorldCom and Sprint⁷² are also unlikely to be significant facility-based players at the local exchange level in Illinois for the near or mid-term.

Despite evidence to the contrary, the Majority finds:

[A]ny unique qualities which SBC may possess may be offset by the experiences of other firms, such as AT&T and MCIW, which are already competing in the Illinois large business market. The presence and visibility of these firms make them most likely to rapidly capture market share from Ameritech Illinois in the near future supporting the argument that these firms are in some manner “equivalent” to SBC. Brand name also contributes to the “equivalency” of potential telecommunications providers. The record contains little evidence that

⁶⁸ “Profits as a percent of sales” is generally comparable to the column “profit margin” in Table 1.

⁶⁹ Staff Exhibit 4.01 at 14 and associated work papers.

⁷⁰ Tr. at 1268-1269.

⁷¹ Although AT&T has invested significantly in the prospect of cable telephony serious technical obstacles remain and the technology has yet to be rolled out on an MSA-wide basis. As such, I do not believe AT&T will be a significant local exchange competitor within the 3-5 year timeframe.

⁷² The recent merger announcement by MCIW and Sprint further erodes confidence in the Order’s conclusion concerning the number of potential entrants.

SBC has a strong brand names [sic] in Illinois or inspires an increased amount of confidence among consumers. This lack of evidence contrasts with the strong national and international brand names of potential and actual competitors such as MCIW, AT&T and Sprint who are all well recognized and active in the industry. (Cite omitted). In such a rapidly changing industry, benefits such as brand name may well balance out any advantages held by SBC thereby increasing the number of firms which we consider "equivalent" potential entrants. Considering the foregoing decisions we conclude that more than a few potential entrants are equivalent to SBC.⁷³

Rather than addressing the unique attributes of SBC as a potential competitor in Illinois' local exchange market and the testimony of its economic witness, the Majority has chosen highlight the presence of three inter-exchange carriers in Illinois and company's alleged lack of a strong brand name in Illinois. The Majority refuses to acknowledge that very few competitors exist that possess the unique qualities of SBC. Had the Majority addressed the evidence at hand and not attempted to redefine "equivalency," the Majority would have found that only one entity currently exists as an equivalent potential competitor to the merged SBC/Ameritech.

5. Proof that alternative means offer a substantial likelihood of ultimately producing deconcentration of the target market or other significant pro-competitive effects.

Historically, horizontal mergers in industries with concentration levels approaching the *de facto* monopoly of Ameritech had been discouraged by economists and regulators. In extremely concentrated markets like that of Ameritech, potential competitors have considerably more value than in markets with "safe" concentration levels. That SBC has unique qualities including highly motivated management, a national and global strategy, and a significant physical presence in Illinois all suggest entry by the company into Ameritech's extremely concentrated market would, in an economic sense, be substantially likely to produce deconcentration and other significant pro-competitive effects. According to Staff,

[T]he extent of competition that SBC can bring to Ameritech Illinois' local exchange markets [must be emphasized]. Cellular One has in excess of (XX) customers in Illinois . . . If SBC were to convince merely one percent of its customers to switch to SBC's local exchange service through unbundled loops, that would almost double the amount of unbundled loops sold by Ameritech Illinois. Moreover, if SBC were able to use its [Cellular One] switches in the Chicago area to provide local exchange service, it would increase the amount of competitive land-line switches by 27 percent. These are significant numbers when viewed in terms of the actual amount of competition that exists in these markets today.⁷⁴

⁷³ Order at 102-103.

⁷⁴ Staff Exhibit 4.00 at 36.

Using the Department of Justice “Safe Harbor” threshold as a benchmark for the significance of relatively small changes in market concentration it is easy to see how even modest penetration into the Illinois market by SBC would produce economically significant deconcentration. A horizontal merger that produces a change of merely 50 HHI points in a concentrated industry (HHI in excess of 1800) raises competitive concerns at the Department of Justice.

To illustrate, Staff witness Graves calculates the current Ameritech-Illinois market share at above 96 percent compared to all CLEC’s with total of slightly more than three percent market share.⁷⁵ This provides a HHI in the post merger market of 9216.⁷⁶ While the Majority finds that “[T]here is little evidence that SBC’s entry into the market would have a greater impact on the Illinois local exchange market . . . than that of potential entrants such as AT&T, MCIW and Sprint,”⁷⁷ a more appropriate question in this case is what impact the loss of SBC as a competitor has on the market. If SBC reduced Ameritech’s market share from 96 to 95 percent the HHI falls from 9216 to 9025,⁷⁸ a decrease of more than 190 points.

However, the record shows that SBC is likely to do better than the current entrants. Assuming that SBC was able to wrestle away one percent more than the three percent⁷⁹ market share currently held by all other CLECs, the HHI drops to approximately 8464.⁸⁰ While still extremely concentrated, the impact of SBC’s entry can be readily seen. This simple analysis shows why courts have generally presumed that almost any entry into monopoly market is significant, especially if it preserves future competition.⁸¹

Deconcentration is only half of the fifth prong. Proper analysis of the pro-competitive element of the actual potential competition doctrine requires placing competitive impact in the context of state law as enunciated by the General Assembly and prior Commission policy. The General Assembly has said that widely affordable telecommunications services are essential to the health, welfare and prosperity of all Illinois citizens.⁸² And on the importance of competition, the General Assembly has found that it will increase innovation and efficiency in the provision of telecommunications services and may lead to reduced prices for consumers, increased investment in communications infrastructure, the creation of new jobs, and the

⁷⁵ ICC Staff Ex. 4.00 at 10.

⁷⁶ $96^2 = 9216$. The actual HHI calculation would also include the residual squares of the other participant’s market shares. Including those numbers adds very few points.

⁷⁷ Order at 107.

⁷⁸ $95^2 = 9025$. See caveat noted above.

⁷⁹ This may be an understatement of the potential for de-concentration. For example, if SBC is able to extract concessions from Ameritech through interconnection agreements, regulatory decisions, or any other factor that affects entry, other CLECs would benefit, thus de-concentrating the market even further.

⁸⁰ $92^2 = 8464$. See caveat noted above.

⁸¹ See, *BA/NYNEX* order at ¶ 139, note 264, citing *BOC Int’l Ltd. v. FTC*, 557 F.2d 27, (2nd Cir. 1977), also *Mercantile Tx. Corp. v. Board of Governors*, 638 F.2d 1255 (5th Cir. 1981).

⁸² 220 ILCS 5/13-102 *et seq.*

attraction of new businesses to Illinois.⁸³ The General Assembly recognizes the growing role states play in regulating telecommunications and adopted law to maximize the development of effective competition in all telecommunications service markets.⁸⁴ It has also long been the policy of the Illinois Commerce Commission to foster competition in Illinois markets.

Illinois public utility mergers that in the past would not have been reviewed for anti-competitive effects, now are required to meet the standard set forth in Section 7-204(b)(6). This is not accidental. The General Assembly recognized the threat to consumers posed by industry consolidation. This policy is especially necessary to produce competition when starting from a monopoly market. The General Assembly's intent to favor competition is not something the Commission should simply set aside when reviewing this merger. Regrettably, the Commission's *status quo* approach is not consonant with the pro-competitive policy of the state. I believe the Majority has erred in concluding that SBC would not have entered the market and that its initial entry into business markets would not have a deconcentrating effect. The foundation of the National/Local strategy is the use of infrastructure developed to serve large business customers to pursue the most profitable residential and small business customers. Potential competition analysis should not exclude the possibility of entry via a related product market, and the Majority fails to offer a compelling reason why such a likelihood should be discounted in this case. The Majority appears to have disregarded the impact that competition for business customers would have on other less sought after markets. Unfortunately, the Majority's apparent policy that a competitor must enter the residential and small business markets *de novo* in order to have a deconcentrating effect places the bar so high that it is not likely that companies like Sprint and MCI WorldCom, no less smaller competitors, could ever meet the standard.

I conclude that even modest success by SBC as a CLEC would have a substantial likelihood of producing deconcentration in the Illinois telecommunications market and that the stated goals of the General Assembly to promote competition require the Commission to find that entry by SBC would have pro-competitive effects.

⁸³ Id.

⁸⁴ Id.

Conclusion

As one of the largest unions in American business history, the merger of SBC and Ameritech will undoubtedly alter the telecommunications landscape in Illinois and around the world for years to come. In many ways our judgment in this matter sets the tone for competition in the next millennium.

Much to my disappointment, the Majority chose to conduct an ad hoc review of the evidence, disregard or distort the parties' positions, misapply of the economics of the legal doctrine, establish an ambiguous standard for assessing the impact of proposed reorganizations on competition and ultimately conclude that this merger is in the best interest of Illinois consumers. In reaching its conclusion, the Majority essentially relied on the word of company executives that SBC will perform its obligations as an incumbent faithfully and will maintain an interest in furthering local competition in Illinois.

While evidently true that SBC may follow large customers into other markets, our concern should be the effect this merger will have on *Illinois'* markets and *Illinois'* consumers. The evidence indicates that SBC seeks scale and scope to compete nationally and internationally, *not locally in Illinois*. In fact, protecting essentially guaranteed local revenue to finance this strategy is exactly what SBC finds attractive about this merger.

Also clear from the evidence is that as SBC enters new markets outside of Illinois, protecting captive customers at home will become increasingly important for this Commission. Barriers to entry will be higher for a longer period of time as SBC fights to protect its local monopoly, and it will be more difficult for competitors to enter Illinois thus effecting prices, quality, and services offered to consumers.

Protecting its local monopoly is only one aspect of the harm wrought on Illinois consumers by this merger. Illinois will also lose an actual potential competitor. Rather than conducting a thorough analysis of the economic aspects of this merger, the Majority merely goes through the motions in applying the Joint Applicant's testimony to black letter economic and legal theory. I believe the evidence shows that a two-year timeframe for analysis is patently baseless and unreasonable. Staff's estimate for the development of competition in the local exchange market is more convincing but is most likely insufficiently short as well. Further, the evidence clearly demonstrates that the Illinois local exchange market is a *de facto* monopoly; that the market is attractive and that SBC would have been reasonably likely to enter absent the merger; that the company possesses the skill and resources to feasibly enter the market absent merger; that there is perhaps only one other truly equivalent competitor; and that even modest success by SBC as a CLEC would have had a substantial likelihood of producing deconcentration in the Illinois telecommunications market.

Despite the clear weight of evidence the Majority concluded:

The evidence supports some but not all of the elements set out in the APC doctrine. In view of the foregoing discussion, the Commission concludes that SBC should not be considered on [sic] actual potential competitor to Ameritech Illinois for local exchange services in Illinois, particularly for mass market customers. The Commssion [sic] finds it important to note that the evidence on the issue of SBC's characterization as an actual potential competitor is such that the evidence allows for more than on [sic] reasonable inference and that the interpretations, import, and applications of this doctrine have varied. Furthermore, it is only one part of our analysis and does not constitute a complete answer to the real issue before us.⁸⁵

The Majority notes that more than one reasonable conclusion can be made. Under their analysis (or lack thereof), I would reluctantly agree. Had the Majority undertaken a systematic and thorough analysis of the evidence necessary to consider the ability of the merged firm to exercise, increase, or maintain its market power, I am confident that evidence would have led this Commission to one undeniable and definitive conclusion: this merger is likely to have a significant adverse effect on competition in Illinois.

As such, I respectfully dissent.

⁸⁵ Order at 108.

Appendix

Table 1
Financial Comparison of Potential Competitors⁸⁶

Company	Profit Margin	Return on Assets	Return on Equity	Current Ratio	Long-term Debt/Equity	Total Cash
SBC	14%	8.69%	35.15%	0.75	0.97	\$816.0M
Ameritech	20%	12.63%	37.80%	0.82	0.65	\$381.0M
AT&T	8.5%	7.67%	19.05%	1.06	0.25	\$4.2M
MCI-WC	-27%	-7.91%	-14.18%	0.61	0.36	\$944.0M
GTE	9.4%	5.59%	29.71%	0.69	1.81	\$771.0M
Bell South	14%	8.87%	21.07%	0.90	0.54	\$2.6B
Bell Atlantic	9.2%	5.30%	22.37%	0.93	1.44	\$784.5M
Sprint	5.5%	4.56%	9.46%	1.21	0.59	\$47.7M
TCI	1.6%	0.44%	7.12%	N/A	8.59	N/A
Group Average	6.13%	5.09%	18.62%	0.87	0.83 ⁸⁷	\$1.3B

Table 2
Average Profit Rates of Dominant Firms: 1960-1970⁸⁸

Firm	Profits after tax as a percentage of sales	Profits after tax as a percentage of equity
IBM	13.0	17.6
Western Electric	4.7	10.7
Eastman Kodak	14.7	19.9
Caterpillar Tractor	8.1	17.2
Boeing	2.0	10.6
Xerox	13.3	22.5
Campbell Soup	6.9	12.5
Gillette	2.4	32.4
Ethyl	7.1	18.3
Los Angeles Times Mirror	6.2	13.2
Timkin	9.8	13.4
Joy Manufacturing	4.2	9.3
Knight Newspapers	6.6	13.0
William Wrigley Jr.	10.0	14.0
Group Average	7.8	16.0
All Manufacturing Average	4.8	11.0

⁸⁶ Work papers of Dr. Hunt, Staff Exhibit 9.0, based on December 15, 1998.

⁸⁷ The average excludes TCI which, if included, would increase the group average D/E ratio to 1.69.

⁸⁸ "The Concentration-Profits Relationship and Antitrust," in *Structure Conduct and Performance*, collected papers of Leonard Weiss, (Audretsch and Yamawaki (eds)), 1992, page 237.